NO.: 335925

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

SALUD RUIZ, individually

Respondent.

v.

JOSE G. CERVANTES and CYNTHIA C. CERVANTES,
Individually ,

Appellants

BRIEF OF RESPONDENT

[Appeal From the Superior Court for the State of Washington in and for the County of Benton, Ruiz v. Cervantes, Civil No.: 10-2-01988-7]

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Introduction:

Plaintiff, Salud Ruiz, sued, alleging causes of action for specific performance, fraud, quiet title to real property, and equitable relief, with regard to a parcel of approximately 90 acres of agricultural real property situated in Benton County, Washington. Ruiz's claims were based upon allegations of a fully performed oral contract, entered into between Ruiz and Jose G. Cervantes and Cynthia Cervantes (hereinafter "Cervantes"). The complaint named Cervantes, and others as defendants. The claims against all defendants, other than Cervantes, were resolved. Defendants Cervantes answered, asserted counter-claims, and defended through March 30, 2014, when their former attorney, withdrew. Thereafter, Cervantes failed to participate in any proceedings pertaining to the case until March 6, 2015, when the judgment quieting title in plaintiff was entered.

An Order of Default and Default Judgment, Quieting Title to Real Property were entered March 6, 2015, pursuant to Local Rule 16, for Cervantes failure to comply with the requirements of LCR 16. The question before this court, is whether the court abused its discretion in denying Cervantes' Motion for Relief from the

Judgment, quieting title to the real property in plaintiff, as a result of Cervantes' failure to comply with the Local Rule 16 of Superior Court for Benton County.

STATEMENT OF THE CASE

Ruiz filed suit on July 29, 2010, seeking specific performance, damages for fraud, quieting title to real property, and equitable relief. CP 002.

All defendants initially appeared in this action by Attorney Scott Johnson, who answered the complaint, and appeared for defendants at multiple depositions, status and settlement conferences, and two of the mandatory pre-trial management conferences. Attorney Johnson withdrew, as attorney for defendants, by order entered March 30, 2014, followed by his Notice of Withdrawal of Attorney filed March 31, 2014. CP 116. Thereafter, Cervantes failed to appear at any scheduled hearings or conferences.

This matter was set for trial a total of seven times, with the last trial date set for February 9, 2015. Preliminary to trial, the Court scheduled a mandatory Settlement Conference for January

8, 2015, and a mandatory Trial Management Conference for January 15, 2015. CP 121, 123, 124, 125. Notices of these hearings were mailed by the Court to Cervantes at the address at which they had been served with summons and complaint. CP 120, 122, 126. Those mailings were returned undelivered. CP 120, 122, 126.

Upon discovering that the notices mailed to Cervantes were being returned as undelivered, plaintiff took the precautionary step of having Cervantes personally served with the Court's notice of hearing for the Settlement Conference (January 8, 2015), Trial Management Conference (January 15, 2015), and trial date (February 9,2015). Those notices were personally served on defendant, Jose G. Cervantes, on December 18, 2014, 21 days in advance of the mandatory settlement conference. CP 128, 130. Cervantes does dispute the service of these notices upon him, and in fact, claims to have appeared for the mandatory settlement conference on January 8, 2015, although he now asserts that he could not find the room where that hearing was conducted. RP March 6, 2015, p. 5, ll 209. Cervantes made no appearance for the Settlement Conference on January 8, 2015. RP March 6, 2015, p.

7. On January 15, 2015, Cervantes made no appearance for the mandatory Trial Management Conference. RP March 6, 2016, p. 6, ll 16-20.

Litigants are required to comply with Benton County Local Rule 16[1] with regard to the pre-trial procedures established for the conduct of Mandatory Settlement Conferences and Pretrial Conferences, including the preparation of a Trial Management Report. Benton County Local Rule 16(a) and (b). Local Rule 16(a)(2) requires that the parties and counsel shall attend the settlement conference. Local Rule 16(a)(2)(A). Local Rule 16(a)(4)(A) provides that sanctions may be imposed by the court in the event of a party's failure to comply, including the entry of an order of default against the non-complying party. Local Rule 16(a)(4)(B) specifically provides:

> (B) Default. Failure to appear at the settlement conference, without prior approval of the court, may constitute an act of default. Any party appearing at the settlement conference may move for default pursuant to CR 55. Costs and terms may be assessed at the discretion of the court.

[1] A complete copy of Benton County Superior Court Local Rule 16 is attached as Appendix A.

Local Rule 16 (b)[2] specifically provides that:

> (a) **Pretrial Conference/Trial Exhibits**. In cases that are governed by a Case Schedule Pursuant to LR 4, the Court shall schedule a Pretrial Conference, which shall be attended by the lead trial attorney of each party who is represented by an attorney and by each party who is not represented by an attorney. The parties must jointly prepare a Trial Management Report. (Emphasis added).

Local Rule 16(d) specifically provides for sanctions against a non-complying party, as follows:

> (d) Sanctions. On motion or on its own, the court may issue any just orders, including those set forth herein, if a party or its attorney: (i) fails to appear at a scheduling or other pretrial conference; (ii) is substantially unprepared to participate-or does not participate in good faith-in the conference; or (iii) fails to obey a scheduling or other pretrial order. Sanctions may include the following:
>
> (1) Prohibiting the disobedient party from supporting or opposing designed claims or defenses, or from introducing designated matters in evidence;
> (2) Striking pleadings in whole or in part;
> (3) Staying further proceedings until the order is obeyed;
> (4) Dismissing the action or proceeding in whole or in part;
> (5) Rendering a default judgment against the disobedient party; or
> (6) Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

[2] Designated LCR 16 (a) in the original.

> Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses-including attorney's fees-incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust. (Emphasis added)

Cervantes failed to attend or participate in the mandatory settlement conference, set by the Court for January 8, 2015, although Cervantes clearly indicated he had notice of the Settlement Conference. RP p. 7, ll 2-9.

Cervantes then, a week later, failed to attend the Pre-Trial management Conference (Pre-trial hearing), on January 15, 2015. Upon Cervantes failure to attend the mandatory Pre-Trial Conference on January 15, 2015, and with the trial scheduled to begin only 25 days later, plaintiff moved, on the record, for an order of default against Cervantes. CP 138. That motion was granted, on the record, by the Honorable Carrie Runge, the judge who presided at the Pre-Trial Management Conference on January 15, 2015. Plaintiff then noted for presentation, the Order of Default, and moved for entry of Default Judgment, Quieting Title to the real property, on March 6, 2015, with notices thereof personally served on Cervantes. RP March 6, 2015.

Defendant, Jose G. Cervantes, appeared personally, on March 6, 2015, at the time and place for the hearing on presentation of the Order of Default and the hearing upon plaintiff's motion for Default Judgment. RP March 6, 2015, p. 2, ll 10-13. At that hearing, the Court specifically inquired of Mr. Cervantes as to his failure to appear at the previous mandatory settlement conference and Pre-Trial Management Conference. Mr. Cervantes offered no adequate explanation of his failure to appear for the settlement conference or Trial Management Conference. RP March 6, 2015, p. 4-7. The Court found that Cervantes had deliberately failed to attend these mandatory hearings. RP March 6, 2015, p. 8, ll 10-14. At that time, the Court entered the Order of Default against Cervantes and Judgment Quieting Title to the real property in plaintiff. RP, March 6, 2015, p. 12, ll 16-17; CP 138, 139.

Cervantes then, through counsel, filed a Motion for Relief from Judgment on April 1, 2015.[3] However, Cervantes did not note that motion for hearing and appear to argue the motion until March

[3] Although a hearing on Cervantes Motion for Relief from Judgment was noted at least eight times prior to March 4, 2015, in each instance Cervantes either failed to appear and argue the motion, or struck the motion on the day of hearing, on one occasion, within one hour of the noted hearing time. CP 154, 156, 173, 174

4, 2016, some 364 days after the Judgment Quieting Title was entered. CP 148. On March 4, 2016, the Honorable Jackie Shea-Brown, upon hearing the motion, transferred the motion to be heard upon special setting before the Honorable Carrie Runge, for dispositive hearing. RP, March 4, 2016, p. 17, ll 15-23. Ultimately, Cervantes motion was heard on its merits, on May 12, 2016, at which time Cervantes Motion for Relief from Judgment was denied. May 12, 2016, p. 19, ll 17-20. At that hearing, the Court stated:

> *Counsel has a copy of the transcript of March 6th proceedings.*
>
> *This Court allowed Mr. Cervantes, gave Mr. Cervantes the opportunity to address the Court a couple of different times.*
>
> *And I was, of course, seeking information from Mr. Cervantes as to why he was not present and why the Court should essentially not enter the requested order of default and default judgment.*
>
> *Quite frankly, after the brief hearing, after giving Mr. Cervantes the opportunity to address the Court, it was my opinion – and I still have that opinion—that Mr. Cervantes had intentionally chosen to ignore notice of the court hearings.*

May 12, 2016, p. 18-19.

An Order Denying Cervantes Motion for Relief from Judgment was entered September 21, 2016. CP 157. At the time of entry of the Order Denying Cervantes Motion for Relief from Judgment, counsel for Cervantes appeared, and argued, again,

against the entry of the Ordering Cervantes Motion for Relief from Judgment, arguing to the Court that the trial of the matter should have again been continued. RP, September 21, 2016.

Argument

1. Defendants Cervantes failed to bring a motion for relief from judgment in accordance with CR60(e)(1) and (2).

RCW 4.72.010 provides:

> *The Superior Court in which a judgment or final order has been Rendered, or made, shall have power to vacate or modify such judgment or order:*
>
> *(1) By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the rules of court relating to new trials.*
> *(2) By a new trial granted in proceedings against defendant served by publication only as prescribed in RCW 4.28.200.*
>
> ***(3) For mistakes, neglect or omission of the clerk, or irregularity in obtaining judgment or order.***
>
> *(4) For fraud practiced by the successful party in obtaining the judgment or order.*
> *(5) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.*
> *(6) For the death of one of the parties before the judgment in the action.*
> *(7) For unavoidable casualty, or misfortune preventing the party from prosecuting or defending.*

(8) for error in judgment shown by a minor, within twelve months after arriving at full age. (Emphasis added)

RCW 4.72.020 provides:

The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party or on his or her attorney in the action, ***and within one year****.*
(Emphasis added)

CR 55(c) provides that:

(1) *Generally. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b) (emphasis added)*

CR 60(b) provides that:

(b) Mistakes; inadvertence; excusable Neglect; Newly Discovered Evidence Fraud; etc*. On motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons (Inter alia):*

(1) *Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;*

The motion shall be made within a reasonable time and ***for reasons (1)(2) or (3) not more than 1 year***

> ***after the judgment, order, or proceeding was entered or taken***. (Emphasis added)

The procedure for an application for relief from judgment is set forth in CR 60(e)(1) and (2) as follows:

> *(1) Motion.* ***Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the Affidavit of the applicant or the applicant' attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.*** (Emphasis added)
>
> *(2) Notice. Upon the filing of the motion and affidavit,* ***the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceedings who may be affected thereby to appear and show cause*** *why the relief asked for should not be granted.* (Emphasis added)

A judgment was entered in this case, quieting title to certain real property in plaintiff, on March 6, 2015. Defendants Cervantes initially filed their motion for relief from judgment on May 14, 2015, noting the motion for hearing for May 22, 2015. CP 148. Defendants subsequently noted their motion for May 29, 2015, at which time the Attorney for defendants telephoned the court on May 29, 2015 to strike the hearing. CP 156. Plaintiff's attorney appeared for the hearing, having no notice that the hearing was

stricken, and an Order was entered, denying Defendant's motion. CP 157. From that Order, Defendants Cervantes appealed.

Defendants Cervantes then subsequently re-filed their Motion for Relief from Judgment, ostensibly to be heard on February 19, 2016, February 29, 2016, March 4, 2016, March 31, 2016, April 22, 2016, and May 12, 2016. At no time within one year from the entry of the judgment did Defendants Cervantes argue their motion for relief from judgment.

Moreover, at no time did Defendants Cervantes apply to the Court for an order to show cause, as specifically required under CR 60(e). In fact, Defendants Cervantes have failed to file an application for an order to show cause, as is required by CR 60(e)(2). Failure to comply with the procedure set forth in the Court Rule is fatal to Cervantes' application. *Cf.* **Allen v. Allen, 12 Wn. App. 795, 797, 532 P.2d 623 (1975).**

Even had proper procedure been followed, the Judgment defendants sought to vacate was entered over 14 months previously. RCW 4.72.010 and CR 60(b)(2) specifically requires the motion to vacate to be brought within one year of entry of the judgment from which relief is sought.

2. Defendant Cervantes Failed to Comply with Local Civil Rule 16. Defendants Cervantes, failed to appear or participate in the Court Scheduled Status Conference on December 18, 2014, a Court Scheduled Settlement Conference on January 8, 2015, and further failed to appear or participate in a Court Scheduled Pre-trial Management Conference set January 15, 2015.

Local Civil Rule 16(d) provides that:

> Sanctions. On motion or on its own, the court may issue any just orders, including those set forth herein, if a party or its attorney:
> (i) Fails to appear at a scheduling or other pretrial conference; (ii) is substantially unprepared to participate - or does not participate in good faith – in the conference; or (iii) fails to obey a
> **Scheduling or other pretrial order. Sanctions may include the**
> **Following:**
>
> **(1)** Prohibiting the disobedient party from supporting or
>
> **(2)** Opposing designated claims or defenses, or from Introducing designated matters in evidence;
> **(3)** Striking pleadings in whole or in part;
> **(4)** Staying further proceedings until the order is obeyed;
> **(5)** Dismissing the action or proceeding in whole or in part;
> **(6) Rendering a default judgment against the disobedient**
> **Party**; or
> **(7)** Treating as contempt of court the failure to obey any order

> Except an order to submit to a physical or mental examination
>
> Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses – including Attorney's fees – incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust. (Emphasis added)

With trial scheduled to begin February 9, 2015, Defendants Cervantes failed to appear for and participate in the Status Conference on December 18, 2014; the Settlement Conference on January 8, 2015; and the Pre-Trial Management Conference on January 15, 2015. Plaintiff, concerned that Defendants Cervantes would claim lack of notice, personally served defendants with the Court's Notice of Settlement Conference and Pre-Trial Management Conference as is shown by the affidavits of service. CP 128, 130.

Cervantes argues that they were deprived of due process because the Court's notices of the settlement conference on January 8, 2015 and Pre-trial Management hearing on January 15, 2015 were sent to an address at which Cervantes no longer resided. That assertion is demonstrably false. In fact, Cervantes

were personally served with the Court's notices of Settlement Conference, Pre-trial Management Conference, and trial on December 18, 2014, 21 days in advance of the mandatory settlement conference. CP 128, 130. Cervantes does not dispute that they received these court notices by personal service. CP 141, 147, and 149. Moreover, Defendant, Jose G. Cervantes acknowledged, at the March 6, 2015 hearing before Judge Runge, that he had been served with those notices. RP, March 6, 2015, p. 6, ll 21-23. Therefore Defendants Cervantes had actual notice of the dates and times of the Settlement Conference and Pre-Trial Management Conference, yet deliberately failed to attend or participate.

Upon Defendant Cervantes' failure to appear for and participate in the scheduled Pre-Trial Management, plaintiff's counsel moved, on the record, for an order of default and default judgment, quieting title in the real property which was the subject of this action pursuant to Local Rule 16(d). The Honorable Carrie Runge, presiding at the Pre-Trial Management Conference, granted plaintiff's motion.

CR 55(a) (1) provides that when a party against whom a judgment for affirmative

relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit a motion for default may be made. A default judgment may then be entered pursuant to CR55 (b).

3. Defendant Cervantes Has Not Demonstrated Good Cause Sufficient to Set Aside the Default and Default Judgment.

CR 55(c) provides that:

> ***(1)*** *Generally. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b) (emphasis added)*

CR 60(b) provides that:

> ***(b) Mistakes; inadvertence; excusable Neglect; Newly Discovered Evidence Fraud; etc****. On motion and upon such terms as are just, the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons (Inter alia):*
>
> > ***(1)*** *Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;*

Defendant Cervantes, in their motion for relief from judgment, relies heavily on the arguments that defendants have

evidence of a *prima facie* defense and that Court Administration mailed notices of the hearings to an address at which defendants no longer lived. Defendant Cervantes completely ignores the fact that actual notice of the Pre-trial Management Conference hearing was received by them, served upon Jose G. Cervantes by Dennis Copeland of Legal Couriers, Inc. CP 128, 130. Moreover, Defendant Cervantes ignores the undisputed fact that he did appear at the March 6, 2015 hearing, at which time the Order of Default and Default Judgment was entered, and that his only intelligible explanation for failing to attend the Pre-trial management Conference was that he was busy with other things. (See Verbatim Report of Proceedings, March 6, 2015, p. lls 15-22.)

An affidavit of service that is regular in form and substance is presumptively correct. **On re the Dependency of A. P., 93 Wn. App. 268, 277, 968 P.2 424 (1998).** To overcome the presumption of service, defendant must prove by clear and convincing evidence that he was not served. *Cf.* **Allen v. Starr, 104 Wash. 246, 247,176 Pac. 2 (1918)**

Defendants completely fail to address the essential elements required by CR 60(b); that defendant's failure to comply, appear

and participate in both the Settlement Conference and the Pre-Trial Management Conference were occasioned by "*mistake, inadvertence, surprise, or excusable neglect.*" In fact, defendants offer not a sentence of meritorious explanation as to defendant's failure to appear and participate in the Settlement Conference on January 8, 2015. In fact, Cervantes states that he was at the Benton County Justice Center to attend the Settlement Conference, but could not find it. RP March 6, 2015, P 6, ll 21-24. Cervantes offers absolutely no explanation why they did not attend the Pre-Trial Management Conference on January 15, 2015. RP March 6, 2015, pp 6-8. At the time of the hearing on plaintiff's presentation of the Order of default and Motion for Default Judgment, Defendant Jose G. Cervantes, who appeared for that hearing, offered no intelligible or credible excuse for the prior failures to appear and participate other than that he was unable to find the location of the settlement conference hearing on January 8, 2015, and was otherwise busy with other things. RP March 6, 2015, pp 6-8. Where a defendant has deliberately refused to appear for court scheduled pre-trial hearings, entry of a default is appropriate. *See* **Thomas v. Green, 32 Wn. App. 29, 31, 645 P.2d 732 (1982).**

Unquestionably, the issue of whether or not the plaintiff paid the agreed price for the purchase of the real property at issue, is a factual issue that would have been resolved at trial. Defendant's argument that plaintiff has not produced evidence of such payment is both false and immaterial to the issue now before the court. Had defendants carefully examined the 3rd Trial Management Report filed by plaintiff, defendants would have found multiple witnesses, including Defendant Cervantes own attorneys, Stephen Winfree and Robert N. Faber, who would testify that on two occasions, once in 2007 and once in 2009, they were task with the preparation of a deed conveying the real property to plaintiff, and in both instances, no additional compensation was due Defendants Cervantes. Moreover, additional witnesses identified in the Trial Management Report were prepared to testify as to the transaction commencing in 2000, between plaintiff's late husband and Defendant Jose G. Cervantes, as well as plaintiff's occupancy and possession, from 2000 through 2009, the substantial improvements made to the premises by plaintiff, and the payment of taxes and irrigation water assessment for the real property. Finally, the Third Trial Management Report lists and identifies 70 separate exhibits intended to be offered in evidence in support of plaintiff's claims.

CP 127 (3rd Trial Management Report). To now assert that the plaintiff has produced no evidence in support of her allegation that the purchase price for the property had been fully paid is simply false.

The question of whether there is evidence supporting plaintiff's claim is not a question before the court at this time. Rather one of the questions to be addressed by the court is whether the defendant has set forth a prima facie defense. *See* **White v. Holm, 73 Wn.2d 348, 352, 351 P.2d 581 (1968).** The questions of whether plaintiff or defendant Cervantes would have prevailed at trial is a question that would have been answered at trial had Defendants Cervantes not deliberately impeded and obstructed the Court's pre-trial and trial schedule for this case.

4. The Order of Default and Default Judgment was entered against Defendants Cervantes as a Sanction, as provided for in Local Civil Rule 16. The Order of Default and Default Judgment, entered March 6, 2015 by Judge Runge, were entered as a sanction. "If there is sufficient justification, a trial court may impose sanctions pursuant to CR 37(d) and Local Rule 16(d)." *See* ***Pamelin Industries, Inc., v. Sheen-U.S.A., Inc.,*** **95 Wn.2d 398, 403, 622 P.2d 1270 (1981).**

The trial court's imposition of sanctions is a matter of trial court discretion.

> *We next turn to the contention that the sanction was unjust in that other less drastic alternatives to default would have been sufficient. Cases are legion holding that the choice of sanctions for violation of a discovery order is discretionary and that the Particular facts and circumstances of each case will determine whether the discretion has been abused. See Annot. 6 A.L.R.3d 713 (1966); Annot. 56 A.L.R. 3d 1109 (1974). In this state CR 37 vests broad discretion in the trial court as to choice of sanctions. A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.*

Reid Sand & Gravel, Inc., v. Bellevue Prop., 7 Wn App. 701 705, 502 P.2d 480 (1972) (Discovery Case; emphasis added)

The gravamen of Cervantes argument now appears to be that the trial court should have considered a "less austere, extreme and draconian," measure as a result of Cervantes deliberate failure to attend and participate in the January 8, 2015 Settlement Conference and January 15, 2015 Pre-trial Management Conference. Appellants Brief at page 11. However, Cervantes does not put forth what alternatives were appropriate, except by inference to suggest that the trial court should have imposed terms and continued the Pre-trial management hearing and trial to later

dates. The trial court clearly considered those options, however since the seventh setting trial date (February 8, 2015) was only 24 days away, the court, in its discretion concluded that another continuance of the trial date was not a viable option. CP 188 (September 21, 2016 Order).

5. Vacating the Judgment Will Cause Substantial Hardship to Plaintiff.

Finally, after receiving judgment quieting title to the real property on March 6, 2015, Plaintiff paid refinanced and satisfied a mortgage lien upon the property in an amount exceeding $200,000.00, paid $23,699.00 in delinquent taxes; $15,908.00 in delinquent irrigation assessments; removed a tenant form the premises; and entered into a lease of the premises for five years with an option on the part of the lessee to extend the term for three additional terms of five years each. CP 171.

> *A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) That the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated*
> [Citations omitted]. ***Little v. King,* 160 Wn.2d 696, 703-704,**

161 P.3d 345 (2007). (Emphasis added).

Certainly, to now set aside a judgment over two years old, and to unwind all that has occurred since that time, including the refinancing and pay-off of a $200,000.00 encumbrance on the property, would work a substantial hardship on Ruiz.

5. Defendant Cervantes failed to file a Notice of Appeal of the Order of Default and Default Judgment within Thirty Days of Entry as Required by RAP 5.2, and Cannot Now Resurrect an Appeal upon a Motion for Relief from Judgment.

Defendants Cervantes filed a Notice of Appeal to Division 3 of the Court of Appeals on June 26, 2015, well after the time permitted for appeal of the Order of Default and Default Judgment. A motion for relief from judgment will not resurrect Defendant Cervantes' right to appeal the Default Judgment entered on March 6, 2015. While the defendant may still appeal the denial of an order denying defendant's motion for relief from judgment, the scope of that appeal is limited to the hearing and denial of the motion for relief from judgment; not to the Default Judgment entered on March 6, 2015.

An appeal from a denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment. The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion.

Bjurstrom v. Campbell, 27 Wn. App. 449, 452, 618 P.2nd 533 (1085)

CONCLUSION

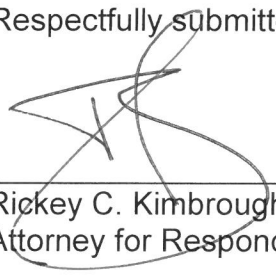
In summary, Defendant Cervantes deliberately failed to appear and participate in the mandatory court-scheduled settlement conference on January 8, 2015, and the mandatory Court scheduled Pre-Trial Management Conference on January 15, 2015, with trial scheduled to commence on February 9, 2015. Defendant Cervantes failed and refused to participate in the preparation of the 3rd Trial Management Report required pursuant to Local Rule 16. As a result, the Court ordered that Defendants were in default pursuant to Local Rule 16(d), and granted a default judgment, quieting title in the described real property in plaintiff. In moving for relief from this judgment, Cervantes has failed to show any excusable neglect on their part. With trial set to start only three weeks after the January 15, 2015 Trial Management Conference, a

continuance, re-setting the trial for an eighth time was not a viable option. Plaintiffs, too, have a right to have their cases heard.

Since entry of the judgment, plaintiff has expended more than $200,000.00 in refinancing and paying the prior existing mortgage lien, paid $39,607.00 in the payment of delinquent taxes, irrigation assessments, evicted tenants, and has entered into a long term lease of the property. To now set that judgment aside would work a very substantial hardship on Ruiz.

The decision of the trial court should be affirmed.

Respectfully submitted



Rickey C. Kimbrough, WSBA No.5230,
Attorney for Respondent

CERTIFICATE OF SERVICE

I, DeNora E. Sandoval have personal knowledge of the facts contained in this brief.

That I am a legal assistant for Rickey C. Kimbrough, attorney for Respondent, am a United States citizen and over the age of eighteen years.

That I served a true and correct copy of Brief of Respondent by email attachment and postage prepaid, first class mail to the following:

Dean Browning Webb, Esq.
Attorney and Counselor at Law
515 East 39th Street
Vancouver, WA 98663-2240
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Email Address: ricoman1968@aol.com

And postage prepaid, first class mail to the following:

Ms. Renee S. Townsley, Clerk/Administrator
The Court of Appeals of the State of Washington Division III
500 N. Cedar Street
Spokane, WA 99201-1905

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: March 8, 2017.

DeNora E. Sandoval
Legal Assistant

Benton/Franklin Superior Court

APPENDIX

Local Civil Rule 16
PRE-TRIAL PROCEDURE

(a) Settlement Conferences. In all cases governed by a Case Schedule pursuant to LR 4, the Court shall schedule a settlement conference.

(1) Preparation for Conference.

(A) No later than the date set forth on the civil case schedule order, all parties shall prepare a position statement which shall be submitted to the Court as set forth in LCR 5(c). No fax copies will be accepted by the court. Position statements shall not be filed in the court file. No party shall be required to provide a copy of the position statement to any other party. The position statement shall include the following:

(i) A brief non-argumentative summary of the case.

(ii) A statement of whether liability is admitted, and if not, the plaintiff's theory or theories of liability and the defendant's theory or theories on non-liability.

(iii) A list of all items of special damages claimed by the plaintiff and a statement of whether any or all of those are admitted by the defendant.

(iv) An explanation of the general damages, including a summary of the nature and extent of any claimed disability or impairment.

(v) A statement of what settlement offers have been made thus far, if any.

(vi) The position statement is to be a summary only. It is not to include a copy of any exhibits, medical reports, expert witness reports, etc. Generally the length of the summary will be 1 - 5 pages. The summary should take the form of a letter that begins with a reference to the name of the case and the cause number. It should not be in the form of a pleading.

(2) Parties to Be Available.

(A) The parties and counsel shall attend the settlement conference except on prior order of the Court upon good cause shown or notification of settlement has been given to Court Administration, under LCR 40(b)(5).

(B) Representative of Insurer and Guardians ad Litem. Parties whose defense is provided by a liability insurance company need not personally attend the settlement conference, but a representative of the insurer of said parties shall be available by telephone or in person with sufficient authority to bind the insurer to a settlement. Guardians ad Litem shall be available by telephone or appear in person.

(3) Private Mediation. Regardless of whether mediation is court-ordered, parties may seek an order allowing them to opt out of the settlement conference by filing a stipulation and order with Court Administration. The request must include a letter from a mediator and signed on behalf of all parties that the case has been mediated or that mediation has been scheduled to occur on or before the date of the settlement conference.

(4) Failure to Attend.

(A) Sanctions. Failure to comply with the provisions of paragraphs 1 and 2 above may result in the imposition of terms and sanctions as the Court may deem appropriate.

(B) Default. Failure to appear at the settlement conference, without prior approval of the court, may constitute an act of default. Any party appearing at the settlement conference may move for default pursuant to CR 55. Costs and terms may be assessed at the discretion of the court.

(5) Proceedings Privileged. Proceedings of said settlement conference shall in all respects be privileged and not reported or recorded. No party shall be bound unless a settlement is reached. When a settlement has been reached, the Judge may in his/her discretion order the settlement agreement in whole, or, in case of a partial agreement, then the terms thereof, to be reported or recorded.

(6) Continuances. Continuances of settlement conferences may be authorized only by the Court on timely application.

(7) Pretrial Power of Court. If the case is not settled at a settlement conference, the Judge may nevertheless make such orders as are appropriate in a pretrial conference under CR 16.

(8) Judge disqualified for trial. A Judge presiding over a settlement conference shall be disqualified from acting as the trial Judge in that matter, as well as any subsequent summary judgment motions, unless all parties agree otherwise in writing.

(a) Pretrial Conference/Trial Exhibits. In cases that are governed by a Case Schedule pursuant to LR 4, the Court shall schedule a Pretrial Conference, which shall be attended by the lead trial attorney of each party who is represented by an attorney and by each party who is not represented by an attorney. The parties must jointly prepare a Trial Management Report.

Trial counsel shall submit to the court clerk at the Pre-Trial Conference all proposed trial exhibits which shall be marked for identification by the clerk as set forth in the Trial Management Report. Unless ordered otherwise, exhibit numbers 1 through 100 shall be allocated to the plaintiff(s) and exhibit numbers 101 and above are allocated to the defendant(s).

(b) Trial Management Report. In cases governed by a Civil Case Schedule Order pursuant to LR 4, the parties must jointly prepare a Trial Management Report. The plaintiff shall prepare an initial report and serve it upon all opposing parties no later than two weeks prior to the date it is due under the Civil Case Schedule Order.

The Report shall be filed with the Court, with a copy served on the court administrator. The Report shall contain:

(1) Nature and brief, non-argumentative summary of the case;

(2) List of issues that are not in dispute;

(3) List of issues that are disputed;

(4) Index of exhibits (excluding rebuttal or impeachment exhibits);

(5) List of plaintiff's requests for Washington Pattern Jury Instructions;

(6) List of defendant's requests for Washington Pattern Jury Instructions;

(7) List of names of all lay and expert witnesses, excluding rebuttal witnesses;

(8) Suggestions by either party for shortening the trial.

(c) Parties to Confer in Completing Report. The attorneys for all parties in the case shall confer in completing the Trial Management Report. If any party fails to cooperate in completing the report, any other party may file and serve the report and note the refusal to cooperate.

(d) Sanctions. On motion or on its own, the court may issue any just orders, including those set forth herein, if a party or its attorney: (i) fails to appear at a scheduling or other pretrial conference; (ii) is substantially unprepared to participate - or does not participate in good faith - in the conference; or (iii) fails to obey a scheduling or other pretrial order. Sanctions may include the following:

(1) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(2) Striking pleadings in whole or in part;

(3) Staying further proceedings until the order is obeyed;

(4) Dismissing the action or proceeding in whole or in part;

(5) Rendering a default judgment against the disobedient party; or

(6) Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses - including attorney's fees - incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

(f) Form of Trial Management Report. A trial management report will be in generally the following form:

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

Plaintiff(s)	Case No.
V.	TRIAL MANAGEMENT REPORT
Defendant(s)	

Pursuant to Lr 16, this Trial Management Report must be filed and served in all cases governed by a Civil Case Schedule. Failure to file and serve this report or to appear at the Pretrial Conference may result in the imposition of monetary sanctions, dismissal of the case, or entry of a default judgment. Failure to fully disclose all items required on this report may result in exclusion or restriction on use of evidence at trial. This is a joint report, requiring counsel to meet, confer and attempt to resolve differences in the matters addressed in this report. A copy of this report must be provided to the assigned judge

A. MEETING: The parties, by their attorneys, met at _____ (address)

on _____ and could not settle the case and are prepared to proceed to trial.

B. NATURE OF CASE (Provide a joint, brief, non-argumentative description of the case suitable for reading to the jury panel):

C. TOTAL NUMBER OF TRIAL DAYS (total of plaintiff's and defendant's case): _____

D. LIST OF ISSUES WHICH ARE NOT IN DISPUTE:

E. LIST OF EACH ISSUE THAT IS DISPUTED (Issues not identified here may not be raised at trial without leave of the Court):

F. EXHIBITS (Trial counsel shall meet with the trial court clerk at the Pre-Trial Conference, to submit all proposed trial exhibits, which admissibility has been stipulated to by the parties, and to index said exhibits numerically. Unless ordered otherwise, exhibit numbers 1 through 99 are allocated to the plaintiff(s) and exhibit numbers 100 and above are allocated to the defendant(s)):

Counsel met on _____, _____, conferred and reviewed a list of all exhibits that will be offered at trial. Any exhibit which is not on said list of exhibits will not be considered except by leave of the court.

G. INDEX OF EXHIBITS (The index shall indicate: (1) the exhibit number, (2) by whom offered, (3) a brief description, (4) whether the parties have stipulated to admissibility, and if not, (5) the legal grounds for the objection(s). Rebuttal or impeachable exhibits need not be listed): List first those exhibits for which admissibility has been stipulated to by the parties.

EXHIBIT NUMBER	DESCRIPTION	STIPULATION As TO ADMISSiBILITY	OBJECTION/GROUNDS (CITE ER)

H. LIST OF PLAINTIFF'S REQUESTS FOR WASHINGTON PATTERN JURY INSTRUCTIONS
(If special and not WPI/WPIC or pattern instructions including bracketed material, attach a copy):

I. LIST OF DEFENDANT'S REQUESTS FOR WASHINGTON PATTERN JURY INSTRUCTIONS
(If special and not WPI/WPIC or pattern instructions including bracketed material, attach a copy):

J. LIST OF NAMES AND SCHEDULE OF ALL LAY AND EXPERT WITNESSES
(Describe type of witness (lay, treating, expert) and party calling witness. Please estimate all necessary time for presentation of all direct and cross examination. Rebuttal witnesses need not be listed):

NAME	PARTY	ESTIMATED DATE AND TIME FOR WITNESS TESTIMONY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed: _____	Signed: _____
Dated: _____	Dated: _____
WSBA #: _____	WSBA #: _____
Phone Number: _____	Phone Number: _____
Attorney For: _____	Attorney For: _____

[Adopted Effective April 1, 1986; Amended Effective September 1, 2000; September 1, 2002, September 1, 2003, September 1, 2007, September 1, 2009, September 1, 2011, September 1, 2012, September 1, 2013, September 2, 2014, September 1, 2015, September 1, 2016]